Supreme Court, U.S.
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In The

Supreme Court of the United States

LEONARD GRAVES, Warden,

Cross-Petitioner,

vs.

LOREN GLEN HUSS, JR.,

Cross-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Iowa Supreme Court reasonably applied federal constitutional law in holding that Petitioner's Fifth Amendment double jeopardy right was not violated by allowing a second trial after a bench trial ended in a constructive *sua sponte* declaration of a mistrial.

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OPENING STATEMENT

In 1987 Petitioner was convicted of first-degree murder in an Iowa state court. In those proceedings, Petitioner admitted he killed the victim and relied solely on an insanity defense. The case was first submitted to the court on stipulated evidence but that trial ended in a constructive *sua sponte* declaration of a mistrial. Petitioner was then tried to a jury, which found him guilty. On habeas review the Eighth Circuit granted the writ, holding that Petitioner's jury trial constituted double jeopardy. However, rather than freeing Petitioner outright, the Eighth Circuit fashioned the equitable remedy of allowing the State to retry Petitioner on the stipulated record which had been submitted to the court in Petitioner's bench trial.

Petitioner has sought certiorari with respect to the Eighth Circuit's remedy. *Huss v. Graves*, S.Ct.No. 01-7064. Respondent opposes granting certiorari on that petition, but if certiorari is granted, the Court should also grant certiorari on this cross-petition challenging the merits of the Eighth Circuit's decision.

OPINIONS BELOW

Huss v. Graves, 252 F.3d 952 (8th Cir. 2001); App. 1 (slip opinion).

Huss v. Graves, No. 4-97-CV-80169 (S.D. Ia. March 29, 2000); App. 13.

State v. Huss, 430 N.W.2d 621 (Iowa 1988); App. 28.

JURISDICTION

The Eighth Circuit granted Petitioner's application for writ of habeas corpus in *Huss v. Graves* on June 7, 2001. The Eighth Circuit denied the parties' petitions for rehearing on August 20, 2001. Petitioner filed a certiorari petition with this Court on November 19, 2001, pursuant to 28 U.S.C. § 1254(1), accepting the Eighth Circuit's ruling on the merits but challenging its remedy. Petitioner's certiorari petition was docketed on November 20, 2001. Pursuant to S.Ct. Rule 12(5), Respondent now files, within 30 days after November 20, 2001, this "Conditional Cross-Petition" challenging the Eighth Circuit's ruling on the merits.

RELEVANT CONSTITUTIONAL AND FEDERAL STATUTORY PROVISIONS

Constitution of the United States, Amendment V: " . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb. . . . "

Constitution of the United States, Amendment XIV, sec. 1: "No state . . . shall deprive any person of life, liberty, or property, without due process of law. . . . "

The Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d)(1):

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; . . .

STATEMENT OF THE CASE

A. FACTS RELATING TO THE DOUBLE JEOPARDY ISSUE.

There is no dispute as to the operative procedural facts. On direct appeal the Iowa Supreme Court summarized the history of the case:

> In May 1986, Loren Huss was charged with first-degree murder in the death of his former girlfriend, Marilyn Sheets. Huss timely notified the State of his intent to rely on defenses of insanity or diminished responsibility. See Iowa R.Crim.P. 10(11)(b). The seemingly senseless brutality of the slaying called into question Huss' competence to stand trial.[1] Hearing on that issue was scheduled for November 24.
>
> Meanwhile, the State deposed two experts listed as prospective witnesses in support of Huss' insanity defense. On the strength of the experts' testimony, the prosecutor and defense counsel engaged in negotiations regarding disposition of the case. Counsel agreed to submit

[1] Police called to the scene of the crime found the victim's body unclothed and covered with bruises and blood, one eye gouged out and her nose severed from her face. Huss was screaming and smearing blood on the walls of the apartment. In Huss' frenzied state, it took four to five officers to restrain him.

the case to the district court upon stipulated evidence, confident that the court would enter a verdict of not guilty by reason of insanity.

What transpired at the hearing on November 24 is pivotal to our resolution of this case and must be recounted in some detail. First, the court received evidence from Dr. Shahe Zenian, a clinical psychologist. Based on this testimony, the court declared Huss competent to stand trial. Defense counsel then tendered a written waiver of jury trial and the court questioned Huss at length regarding his understanding of the waiver. Significantly, the court asked Huss whether he understood "that by waiving your right to a jury trial you are waiving your right to have those twelve people decide your case and leaving it up to just this court, one person?" The court concluded the colloquy by stating: "Then we will proceed with a bench trial before this court."

Counsel for the State then expressed the parties' desire to submit the case to the court on stipulated evidence, including the minutes of testimony, depositions of the State's witnesses and defense experts, and certain audio recordings of Huss taped at the crime scene and during a custodial interrogation. Defense counsel assented to this procedure on the record. The court then proceeded, at the State's request, to question Huss about his waiver of the confrontation and cross-examination rights implicated in a stipulated trial and, finally, whether Huss understood the potential ramifications of a finding of not guilty by reason of insanity "in the event the court were to make such a finding."

At this point, the record reveals that court and counsel adjourned to chambers for an off-the-record conference. When the record resumed, the prosecutor attempted to clarify the State's position as follows.

> I wrote the minutes of testimony and I participated in all of the depositions in this case. Therefore, being completely familiar with the evidence in this matter, it is the State's understanding that given the record as it now stands . . . that the court would essentially be placed in the position of having no evidence contrary to the fact that Loren Huss was in fact the individual who killed Marilyn Sheets and that would leave the court only with the determination as to whether or not at the time of the commission of that offense, based upon the attendant circumstances as witnessed by the police officers, the fire medic people, and based upon the evaluations of Mr. Huss by competent psychiatric and psychological witnesses, *the only question left for the court would be whether or not Mr. Huss was guilty of this offense or not guilty by reason of insanity* as those reasons are set out in both the criminal code of the State of Iowa and the Iowa Rules of Criminal Procedure.
>
> And that further, in the event of such findings, the court's only options would be that *if the defendant were found guilty by reason of committing the murder without the excuse of insanity, the court's only option would be to sentence the defendant criminally to life in prison. Or in the alternative if the court were to find that the defendant was not guilty by reason*

> *of insanity, it is my understanding the court would have no option . . . but to order the defendant committed* for . . . whatever period of time it took for the court to then subsequently find that there had been a sufficient change in his condition that would allow his release.

(Emphasis added.)

For the record, defense counsel concurred in the procedure outlined by the State. After inquiry once again whether Huss knew what was going on, the court agreed to take the matter under advisement. Counsel then delivered impassioned closing arguments, marked by a common plea that the court find Huss not guilty by reason of insanity.

It appears safe to say that the court's ruling, filed in February 1987, hit the parties like a bombshell. Much to counsels' surprise, the district court found the evidence lacking in foundation to support Huss' defense of insanity. Moreover, based on the representations of counsel, the court concluded that it was "limited in its findings to the consideration of the defendant's sanity at the time of the offense." The earlier proceeding was characterized by the court as "a pretrial hearing only." It concluded by scheduling the case for jury trial, noting "the defendant may raise the issue of insanity at trial if he desires to do so."

This unexpected turn of events prompted a flurry of motions and the withdrawal and substitution of counsel in advance of Huss' subsequent jury trial. . . .

App. 28-32 (footnote and emphasis in original).

B. FURTHER STATE AND FEDERAL COURT PROCEEDINGS.

At the jury trial, Petitioner again asserted an insanity defense. Drs. Taylor and Zenian testified on his behalf. The State presented a new psychiatrist who testified that Petitioner was not legally insane at the time of the homicide. The jury found Petitioner guilty of murder.

On direct appeal, the Iowa Supreme Court, relying primarily on *Gori v. United States*, 367 U.S. 364 (1961), held that the trial court's decision not to issue a verdict constituted a "*sua sponte* declaration of a mistrial" that was "prompted solely by a desire to protect the defendant's rights." Accordingly, Petitioner's due process rights were not violated by subjecting him to a second trial. App. 36.

Petitioner sought federal habeas relief. The federal district court held that the Iowa court "correctly" applied federal constitutional standards. It concluded that "the analysis of what occurred after submission to the trial judge . . . was primarily a fact-bound determination on which the Iowa Supreme Court's decision is binding on this court." App. 26. It summarized its ruling:

> In summary, the decision of the Iowa Supreme Court constitutes a reasonable application of federal double jeopardy law and the evidence in this case concerning the mistrial that the Iowa district judge declared. The State trial judge's only purpose, according to the factual decision of the Iowa Supreme Court, was to give the defendant a fair trial.

App. 26.

Petitioner appealed to the Eighth Circuit. That court reversed Petitioner's conviction, holding that the Iowa Supreme Court's ruling on the double jeopardy issue was "contrary to" relevant Supreme Court precedent as expressed in *United States v. Jorn*, 400 U.S. 470 (1971). App. 6-10. The equitable remedy fashioned by the Eighth Circuit was release of Petitioner unless the State, within 90 days, retried him on the stipulated evidence from his aborted bench trial. App. 10-12. Both parties requested rehearing, Respondent on the merits and Petitioner on the remedy. Rehearing was denied[2] and the mandate issued on August 28, 2001. App. 37.

The State retried Petitioner on November 26, 2001, by submitting the stipulated record from the first trial to a different judge. On December 13, 2001, the court found Petitioner not guilty by reason of insanity. Petitioner will remain in custody until it is determined that he is not a danger to himself or others. Iowa R. Cr. P. 21(8).

REASONS FOR GRANTING THE WRIT

If the Court grants Petitioner's request for certiorari with respect to the Eighth Circuit's equitable remedy, it should also review the Eighth Circuit's decision on the merits, based on the following.

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[2] Two judges would have granted Respondent's petition for rehearing en banc. App. 37.

I. IN ANALYZING THE DOUBLE JEOPARDY ISSUE UNDER THE "CONTRARY TO" REVIEW STANDARD OF THE AEDPA, THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH THE SIXTH CIRCUIT'S HOLDING IN *JOHNSON v. KARNES*, AS WELL AS THE UNITED STATES SUPREME COURT'S HOLDING IN *WILLIAMS v. TAYLOR*.

In *Williams v. Taylor*, 529 U.S. 362 (2000), this Court discussed the "contrary to" and "unreasonable application of" review standards of the AEDPA. *See* 28 U.S.C. § 2254(d). The Court held that the "contrary to" standard applies only to "questions of law" and cases involving "facts that are materially indistinguishable from a relevant Supreme Court precedent." 529 U.S. at 405, 412-13 (O'Connor, J., delivering the opinion of the Court with respect to Part II). On the other hand, the "unreasonable application" standard applies to cases where the state court "identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Id.* at 407. Also, "the phrase 'clearly established Federal law, as determined by the Supreme Court of the United States' . . . refers to the holdings, as opposed to the dicta, of [the Court's] decisions as of the time of the relevant state-court decision." *Id.* at 412. Moreover, a state court application can be "reasonable" even if it is "erroneous" or "incorrect". *Id.* at 411-12.

Prior to *Williams* and consistent therewith, the Sixth Circuit Court of Appeals had held that the question of whether a mistrial declaration results in double jeopardy is a mixed question of law and fact, resulting in habeas review under the "unreasonable application" standard of

the AEDPA. *Johnson v. Karnes*, 198 F.3d 589, 593 (6th Cir. 1999), citing *Harpster v. Ohio*, 128 F.3d 322, 327 (6th Cir. 1997). Accordingly, the Eighth Circuit's decision in the case at bar is in conflict with the Sixth Circuit.

The *Johnson* court noted:

> The Supreme Court has made clear that "in passing on the propriety of a declaration of mistrial granted . . . on the court's own motion," the reviewing court must "balanc[e] 'the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him . . .' against the public interest in insuring that justice is meted out to offenders." *United States v. Scott*, 437 U.S. 82, 92, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978) (quoting *Downum v. United States*, 372 U.S. 734, 736, 183 S.Ct. 1033, 10 L.Ed.2d 100 (1963)).
>
> In balancing these significant interests, reviewing courts must also grant considerable deference to the trial court's determination that manifest necessity warranted a mistrial. [Citing *Arizona v. Washington*, 434 U.S. 497, 511 (1978).]

Johnson v. Karnes, 198 F.3d at 593. "Balancing" and "deference" are incompatible with review under the "contrary to" standard.

In the case at bar, the federal District Court correctly characterized as "primarily fact-bound" the Iowa Supreme Court's determination that the trial judge's only purpose in granting the mistrial was to give Petitioner a fair trial. App. 26. It further correctly ruled that this holding was not an "unreasonable application" of Supreme Court precedent as stated in *Gori*, notwithstanding the Court's later decisions in *United States v. Jorn*, 400

U.S. 470 (1971), and other "manifest necessity" double jeopardy cases. App. 25-27.

The Eighth Circuit, on the other hand, analyzed the case under the less-deferential "contrary to" review standard. App. 3. Use of this standard conflicts with *Johnson* and *Williams* because the issue does not present a pure "question of law," *Johnson*, 198 F.3d at 593, and the facts are not "materially indistinguishable from a relevant Supreme Court precedent." *Williams*, 529 U.S. at 405. With respect to the facts, the Eighth Circuit decision conceded that the case not only presented "unique circumstances" but was "quite obviously far removed from the norm." App. 10.

Importantly, the question in this case is a close one, such that application of the wrong review standard has led to the wrong result, as discussed below.

II. THE IOWA SUPREME COURT REASONABLY APPLIED UNITED STATES SUPREME COURT PRECEDENT IN *GORI v. UNITED STATES*, NOTWITHSTANDING LATER DECISIONS SUCH AS *UNITED STATES v. JORN*.

A. The Iowa Supreme Court reasonably relied on *Gori*.

The Iowa Supreme Court, after reviewing United States Supreme Court double jeopardy jurisprudence,[3]

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[3] In addition to *Gori* and *Jorn*, the decision discusses *Green v. United States*, 355 U.S. 184 (1957); *Illinois v. Somerville*, 410 U.S. 458 (1973); *Serfass v. United States*, 420 U.S. 377 (1975); *Oregon v. Kennedy*, 456 U.S. 667 (1982); and *Wade v. Hunter*, 336 U.S. 684 (1949). App. 32, 38, 35.

ultimately relied on *Gori v. United States* for the proposition that no double jeopardy results where a mistrial declaration was "prompted solely by a desire to protect the defendant's rights," that is, where the declaration was in the "sole interest of the defendant." App. 36, citing *Gori v. United States*, 367 U.S. 364, 368-69 (1961). The Eighth Circuit, however, concluded that later Supreme Court decisions, especially *United States v. Jorn*, 400 U.S. 470 (1971), limited the holding in *Gori*, resulting in a legal standard "substantially different" from the one applied by the Iowa court. App. 6.

While the Eighth Circuit's analysis may well be appropriate for review of a federal criminal case on direct appeal, it does not necessarily follow that the Iowa court's ruling was "unreasonable" under the habeas corpus statute. After all, the Supreme Court itself has been divided on the major "manifest necessity" cases (*Gori* (5-4), *Jorn* (plurality), *Downum* (5-4)[4], *Somerville* (5-4)[5], *Washington* (6-3)[6]), strongly suggesting that the concept of "manifest necessity" inherently allows a range of reasonable applications. *See United States v. Dixon*, 913 F.2d 1305, 1311 (8th Cir. 1990) ("Whether the 'high degree of necessity' for declaration of a mistrial has been reached in a particular trial is difficult to evaluate.").

In *Gori*, the trial judge had *sua sponte* declared a mistrial based on his belief that the prosecutor would ask questions which would improperly reveal other crimes

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[4] *Downum v. United States*, 372 U.S. 734 (1963).

[5] *Illinois v. Somerville*, 410 U.S. 458 (1973).

[6] *Arizona v. Washington*, 434 U.S. 497 (1978).

committed by the defendant. On certiorari, a divided Court found no double jeopardy because the mistrial had been granted "in the sole interest of the defendant." 367 U.S. at 369. It noted that it had "long favored the rule of discretion in the trial judge to declare a mistrial." *Id.* at 368. "[Trial court judges] are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere." *Id.* at 369.

In *Jorn*, the Court held that the defendant's double jeopardy rights were violated where the trial court, acting on its own motion and without the defendant's consent, discharged the jury and declared a mistrial when it concluded that taxpayers who were to be called as witnesses by the government, and who allegedly had been aided by the defendant in preparing their tax returns, had not been properly advised on initial contact by the IRS of their constitutional rights against self-incrimination and thus should be allowed to obtain legal counsel before testifying. On this record, the Court was unable to conclude that the declaration of a mistrial was made "in the sole interest of the defendant." 400 U.S. at 483. The Court discouraged *post hoc* appellate court assessment of which side benefitted from the mistrial ruling but also reiterated its stance that "bright-line rules based on either the source of the problem or the intended beneficiary . . . would only disserve the vital competing interests of the Government and the defendant." *Id.* at 483, 486.

The Eighth Circuit decision cites *Jorn* for the proposition that an appellate court may not make a *post hoc* assessment as to which party would in fact have benefitted from the declaration of a mistrial. App. 4. However,

in *Jorn* the mistrial was declared in part for the benefit of the *witnesses*, whose testimony was not and could not be known at the time the mistrial was declared. After the witnesses had consulted with their own counsel, they may have decided not to testify, which would *probably* have benefitted the defendant, but which also *may have* benefitted the government. *Jorn*, 400 U.S. at 482-83, 486-87. The critical question in *Jorn*, not present here, was the nature and degree of "speculation" as to the content and effect of the future testimony of several witnesses. In contrast, in the case at bar, the bench trial judge was fully aware of all of the circumstances, including the parties' anticipated disposition of the case. When he determined, as finder of fact, that he could not accept Petitioner's insanity defense, his sense of fairness (as opposed to speculation about some unknowable future development) dictated that he allow Petitioner to be retried by a different tribunal rather than to be found guilty of first-degree murder on the evidence already presented.

Significantly, *Jorn* did not overrule *Gori*. Rather, it distinguished *Gori* on its facts. *Jorn*, 400 U.S. at 483 ("In sum, we are unable to conclude on this record that this is a case of a mistrial made 'in the sole interest of the defendant.' "). Under these circumstances, it was not unreasonable for the Iowa Supreme Court to rely on *Gori* and implicitly to distinguish *Jorn* on its facts. *See* App. 35 (citing *Jorn* for proposition that re-prosecution is permitted where it serves societal interest in achieving justice, and citing *Gori* for alternative ("or") proposition that "sole interest of defendant" may justify mistrial). Moreover, at least one United States Supreme Court case decided *after Jorn* has cited *Gori* with approval. *See Illinois*

v. Somerville, 410 U.S. 458, 462-63 (1973) (citing *Gori* for deference to trial court's discretion and noting: "The interests of the public in seeing that a criminal prosecution proceed to verdict, either of acquittal or conviction, need not be forsaken by the formulation or application of rigid rules that necessarily preclude the vindication of that interest.").

More recently, federal courts of appeals, including the Eighth Circuit, have acknowledged the vitality of *Gori*. "[M]istrial declarations made for the defendant's benefit are treated favorably because double jeopardy does not forbid retrial where a mistrial has been granted for the defendant's benefit." *United States v. Givens*, 88 F.3d 608, 613 (8th Cir. 1996) (explicating discussion in *United States v. Allen*, 984 F.2d 940, 943 (8th Cir. 1993)); *United States v. Bates*, 917 F.2d 388, 395-96 (9th Cir. 1990); *see also United States v. Gutierrez*, 130 F.3d 330, 332 (8th Cir. 1997) (citing *Givens* for proposition that "there is no double jeopardy difficulty if the second trial was for the benefit of the defendant").

Based on these considerations, the Iowa Supreme Court reasonably relied on *Gori v. United States*.

B. The Iowa Supreme Court reasonably applied United States Supreme Court precedent in holding that, in the unique circumstances of this case, Petitioner's double jeopardy rights were not violated.

It is very significant that the constructive mistrial ruling in this case occurred in the context of a bench trial rather than a jury trial. First, almost all of the Supreme

Court double jeopardy jurisprudence, including *Gori* and *Jorn*, involves jury trials, resulting in a lack of direct factual precedent.[7]

Second, unlike a jury trial, a bench trial is not necessarily over when a mistrial is declared. This latter consideration reveals a major analytical flaw in the Eighth Circuit's decision: it faults the bench trial judge for not considering certain options, while ignoring the fact that Petitioner could have "retained control" of his trial by availing himself of the same options.

The Eighth Circuit, citing *United States v. Dinitz*, 424 U.S. 600, 609 (1976), supported its double jeopardy holding by concluding that Petitioner was denied his right to "retain primary control" of the course of his trial when the judge, without consulting with the parties, declined to issue a verdict and ordered that the matter be set for trial by a jury. App. 5. Further, the decision noted that the judge had an "available alternative" of allowing the parties, under Iowa Rule of Criminal Procedure 23(2)(c),[8] to

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[7] The only United States Supreme Court decision involving a mistrial in a bench trial is apparently *United States v. Jenkins*, 420 U.S. 358 (1975), where that fact was not particularly relevant to the double jeopardy issue. *Jenkins* was overruled by *United States v. Scott*, 437 U.S. 82 (1978) (holding that double jeopardy does not apply where defendant causes trial to end without reaching issue of guilt or innocence). *See Scott*, 437 U.S. at 97, n. 9 (mentioning that *Jenkins* was bench trial).

[8] The rule reads:

> c. **Trials Without Juries.** On a motion for a new trial in an action tried without a jury, the court may where appropriate, in lieu of granting a new trial, vacate the judgment if entered, take additional testimony,

supplement the record supporting the insanity defense. App. 7. However, the panel decision failed to note that Petitioner himself could have "retained primary control" of the proceeding by moving to supplement the record or demanding a verdict under the same rule. The fact that Petitioner did not do so strongly supports the Iowa Supreme Court's implicit finding that Petitioner expected the judge, if compelled to reach a verdict, would find him guilty, and that Petitioner therefore concluded it was in his best interest not to demand a verdict. Petitioner's acquiescence in the judge's "mistrial" ruling thus contradicts the Eighth Circuit's conclusion that he was "denied his right to receive a judgment from 'a tribunal he might believe to be favorably disposed to his fate,' when the judge refused to render a verdict." App. 8, quoting *Jorn*, 400 U.S. at 486. Petitioner's acquiescence also supports the Iowa Supreme Court's conclusion that the mistrial was declared solely for his benefit.

Given this record, certiorari on the merits should be granted. The Eighth Circuit, in direct conflict with *Johnson v. Karnes* and *Williams v. Taylor*, applied an inappropriate

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amend findings of fact and conclusions of law or make new findings and conclusions, and enter judgment accordingly.

See State v. Miles, 346 N.W.2d 517, 518 (Iowa 1984) (rule 23(2)(c) has same role in criminal cases as rule 179(b) in civil cases); *City of Fort Dodge v. Civil Serv. Comm'n*, 562 N.W.2d 438, 440 (Iowa Ct.App.1997) (purpose of rule 179(b) motion is to advise counsel and appellate court of basis of trial court's decision in order that on appeal counsel may direct attack upon specific adverse findings or rulings).

standard of review resulting in an erroneous granting of the habeas writ.

CONCLUSION

If this Court grants Petitioner's request for certiorari on the remedy, it should also grant certiorari on this cross-petition challenging the merits of the Eighth Circuit's decision.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-2219

Loren Glen Huss, Jr., Appellant, v. Leonard Graves, Warden, Appellee.	* * * * * * *	Appeal from the United States District Court for the Southern District of Iowa.

Submitted: March 15, 2001

Filed: June 7, 2001

Before RICHARD S. ARNOLD, FAGG, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

After Loren Huss was charged with the first-degree murder of his girlfriend, his attorney and the state prosecutor assigned to his case both came to the view that he was insane at the time of the killing. The parties therefore agreed to a bench trial on a stipulated record, in the belief that the only reasonable outcome was a judgment of not guilty by reason of insanity. The record at the state bench trial consisted of depositions from a psychiatrist and a

psychologist who opined that Mr. Huss was not responsible for his acts, in addition to tapes and depositions describing Mr. Huss's bizarre behavior. At the conclusion of the proceeding, both the prosecutor and the defense counsel argued for a judgment of not guilty by reason of insanity.

Two months later, however, the state trial judge announced that he would not enter a judgment because he was unable to find Mr. Huss not guilty by reason of insanity due to concerns that he had about the evidence. The judge then set the case for a jury trial, holding that the proceedings to that point had been in the nature of a pretrial hearing only. At the jury trial that followed, to which Mr. Huss raised a double jeopardy objection, the prosecution aggressively sought a conviction and produced three expert witnesses who testified that Mr. Huss was sane; it also introduced photographs of the crime scene and evidence of Mr. Huss's previous convictions for crimes against women. The jury found Mr. Huss guilty, and he received a life sentence.

The Iowa Supreme Court upheld Mr. Huss's conviction on appeal. It rejected the trial court's characterization of the initial proceeding as a pretrial hearing and held instead that it was indeed a trial at which jeopardy had attached. *See State v. Huss*, 430 N.W.2d 621, 624 (Iowa 1988), *cert. denied*, 490 U.S. 1024 (1989). The court concluded, however, that double jeopardy principles did not preclude a retrial because the trial court's refusal to enter a judgment was akin to a mistrial that was granted in Mr. Huss's sole interest. *See id.* at 624-25.

Mr. Huss then petitioned for federal habeas relief, *see* 28 U.S.C. § 2254, again claiming double jeopardy as grounds for relief. The district court held that the Iowa Supreme Court's determination that the initial proceeding resulted in a mistrial granted for Mr. Huss's sole benefit precluded a finding of double jeopardy and thus refused to grant the writ. This appeal followed. We hold that the Iowa Supreme Court's holding was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," *see* 28 U.S.C. § 2254(d)(1), and we therefore grant the writ on the conditions described later in this opinion.

I.

Our power to grant habeas relief is limited. We may grant habeas relief to a state prisoner only if the decision of the state court was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," *see* 28 U.S.C. § 2254(d)(1). For a state court decision to be "contrary to" federal law, the decision must be "substantially different from the relevant precedent of [the Supreme] Court," *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

The Iowa Supreme Court, *see Huss*, 430 N.W.2d at 624-25, relied on *Gori v. United States*, 367 U.S. 364, 365, 368-69 (1961), in concluding that the double jeopardy clause does not prevent the retrial of a defendant when an earlier mistrial was entered solely for his benefit. It is true that the Supreme Court in *Gori*, 367 U.S. at 369, stated that it was "unwilling, where it clearly appears

that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial." But we think that later Supreme Court decisions have significantly limited the holding in *Gori*.

In *United States v. Jorn*, 400 U.S. 470, 483 (1971), a plurality of the Supreme Court rejected the idea that a defendant could be subject to a second trial simply because it appeared that he or she benefited from an earlier mistrial. It noted that *post hoc* judgments on who benefits from a mistrial are "nothing more than an exercise in pure speculation," *id.*, and that to allow a retrial "based on an appellate court's assessment of which side benefited from the mistrial ruling does not adequately satisfy the policies underpinning the double jeopardy provision," *id.* In *Illinois v. Somerville*, 410 U.S. 458, 469 (1973), moreover, a case in which the Court quoted approvingly from *Jorn* and adopted its standards, the Court held that the lack of prejudice to a defendant from a mistrial is not, by itself, sufficient to "preclude the defendant's invocation of the double jeopardy bar," *id.* at 471. Although the question of who benefits from a mistrial remains a matter of relevance under Supreme Court precedent, it is not by itself determinative, as the Iowa Supreme Court evidently believed.

By focusing on the "sole interest of the defendant" language in *Gori*, 364 U.S. at 369, the Iowa Supreme Court neglected to weigh other important considerations that are relevant to the question of whether a trial has proceeded in violation of the double jeopardy clause. A defendant may be retried following a mistrial granted without his consent only if there was a "manifest necessity," *United States v. Perez*, 22 U.S. 579, 580 (1824), for the

mistrial; *see also Jorn*, 400 U.S. at 481 (plurality opinion). The concept of "manifest necessity" does not lend itself to rigid application, and requires a due regard for the facts and circumstances of each case. *See Arizona v. Washington*, 434 U.S. 497, 506 (1978). In particular, a determination of whether manifest necessity required a mistrial involves, among other things, an inquiry into whether there were alternatives to a mistrial, *see Jorn*, 400 U.S. at 487 (plurality opinion), and whether the trial court gave the defense counsel an opportunity to explain his or her position on a mistrial, *see Washington*, 434 U.S. at 515-16.

A final consideration in this kind of case is whether the granting of a mistrial denied the defendant the right to "retain primary control of the course to be followed" at trial. *See United States v. Dinitz*, 424 U.S. 600, 609 (1976). A defendant has an important interest in "conclud[ing] his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate," *Jorn*, 400 U.S. at 486 (plurality opinion). This question is separate from the question of who the court thinks would benefit from a mistrial, because it focuses on the defendant's right to choose whether to accept the purported benefit of a mistrial.

The Supreme Court has thus clearly indicated that courts are to look beyond the single question of who benefits from a mistrial when determining whether double jeopardy bars a retrial. Even if Mr. Huss benefited from the mistrial, a retrial is not constitutional unless there was "some important countervailing interest of proper judicial administration," *Somerville*, 410 U.S. at 471, motivating the mistrial.

We believe that by relying on the "sole interest" language of *Gori*, 364 U.S. at 369, to the exclusion of other relevant considerations, the Iowa Supreme Court applied the incorrect legal standard to Mr. Huss's case. This does not mean that Mr. Huss is necessarily entitled to habeas relief: As we have said, we may grant relief only if the decision of the Iowa Supreme Court is "substantially different," *Williams*, 529 U.S. at 405, from what the decision would have been if that court had used the legal standard established by the Supreme Court. We must therefore apply that standard to the facts of this case to determine whether a double jeopardy violation has occurred.

II.

To make such a determination, we must first decide whether Mr. Huss has twice been placed in jeopardy. The Iowa Supreme Court found that he had, *see Huss*, 430 N.W.2d at 624, and we concur in that assessment. Although both parties to the bench trial agreed that Mr. Huss should be found not guilty by reason of insanity, that agreement of course could not bind the trial court and the trial court thus retained full power to find Mr. Huss guilty of murder. Under these circumstances, it is clear that this initial proceeding was a trial to which jeopardy attached. The state appears to concede as much on appeal, and instead focuses its argument on the contention that twice placing Mr. Huss in jeopardy did not in this case violate the double jeopardy clause.

In evaluating that argument, we consider whether there was a "manifest necessity," *Perez*, 22 U.S. at 580, to

grant a mistrial in Mr. Huss's case. The state judge granted the mistrial because he found himself unable to enter the judgment of not guilty by reason of insanity that both Mr. Huss and the prosecution had expected. In so doing, however, the judge failed to consider potential alternatives to a mistrial, an inquiry that is central to determining whether manifest necessity requires a mistrial. *See Long v. Humphrey*, 184 F.3d 758, 761 (8th Cir. 1999). The most obvious alternative available to the judge was to enter a judgment of guilty: There was no error of law or unfair prejudice to Mr. Huss during the bench trial. The judge could also have simply asked the parties to supplement the record. Under Iowa law, moreover, a judge in a bench trial is allowed to reopen the evidence even after the entry of judgment. *See* Iowa R. Crim. P. 23(2)(c). If the judge believed that the evidence of Mr. Huss's insanity was insufficient, he could have entered a verdict of guilty and then granted a defense motion to reopen the evidence. Instead, before declaring a mistrial, the judge failed even to ask Mr. Huss's counsel for her opinion on whether Mr. Huss wanted a mistrial.

Contrary to the state's position, this case is not similar to those in which a mistrial is declared when a jury is unable to reach a verdict, a situation in which a finding of manifest necessity is almost always justified. *See Washington*, 434 U.S. at 509-10. The permissibility of a retrial following a hung jury is based largely on the difficulty of getting twelve independent decision makers to agree on one view of the evidence.

Mr. Huss's first trial, however, was conducted before a judge acting as the sole fact finder. The failure of a judge to reach a verdict is vastly different from a similar

failure by a jury, since a judge need not agree with anyone on his or her view of the evidence. The difference here is even greater because, as noted before, the state judge could have requested further evidence if he was unsure of the proper verdict. We thus conclude that there was no manifest necessity for a retrial here.

By declaring a mistrial and setting Mr. Huss's case for a jury trial, we think that the state judge also denied Mr. Huss his right to retain primary control over the course of his trial. In particular, Mr. Huss was denied his right to receive a judgment from "a tribunal he might believe to be favorably disposed to his fate," *Jorn*, 400 U.S. at 486 (plurality opinion), when the judge refused to render a verdict. The state maintains, however, that in the absence of a mistrial the state judge would have entered a judgment of guilty, and thus that Mr. Huss had no interest in seeing the bench trial through to its conclusion.

Even if the state is correct that Mr. Huss's conviction was inevitable, we reject the conclusion that it necessarily follows that Mr. Huss had no interest in continuing the bench trial. Under Iowa law, a criminal defendant need prove his insanity only by a preponderance of the evidence. *See* Iowa Code Ann. § 701.4. Nearly all of the evidence at the bench trial pointed to a conclusion that Mr. Huss was insane, and so it appears to us that Mr. Huss would have had more than a reasonable prospect of having a conviction reversed on the grounds of the sufficiency of the evidence. Of course, we do not know what course of action Mr. Huss would have chosen had the state judge requested his views on the issue of a mistrial, but we are unconvinced that he would certainly have chosen a new trial. We therefore believe that the judge

denied Mr. Huss's right to retain primary control over the course of his trial when the judge granted a mistrial *sua sponte* without consulting him.

In granting a mistrial, moreover, the state judge undermined a major protection afforded by the double jeopardy clause. The prohibition of a retrial prevents the government from "gain[ing] an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own," *United States v. DiFrancesco*, 449 U.S. 117, 128 (1980). In this case, that aspect of double jeopardy appears to us to be particularly relevant. Mr. Huss presented his full case for his insanity at the bench trial without prosecution rebuttal. At the jury trial, Mr. Huss presented essentially the same case, but the prosecution produced a great deal of new evidence aimed specifically at countering Mr. Huss's case for insanity. As a result, Mr. Huss's conviction is now supported by ample evidence and is thus virtually unassailable on the grounds of sufficiency of the evidence. Under these circumstances, we think that the granting of a mistrial, rather than being in Mr. Huss's interest, may well have prejudiced him very considerably.

After applying the proper legal standard to this case, we believe that there was no manifest necessity for a mistrial in this case, and that the mistrial declaration stripped Mr. Huss of his right to maintain primary control over his trial and may well have compromised his effort to prove his insanity. We are therefore obligated to conclude that under "clearly established Federal law, as determined by the Supreme Court of the United States," *see* 28 U.S.C. § 2254(d)(1), Mr. Huss's retrial and subsequent conviction violated the double jeopardy clause. The

Iowa Supreme Court's decision finding no constitutional violation is therefore "substantially different," *Williams*, 529 U.S. at 405, from relevant Supreme Court precedent, thus entitling Mr. Huss to some form of habeas relief.

III.

"[H]abeas corpus is, at its core, an equitable remedy," *Schlup v. Delo*, 513 U.S. 298, 319 (1995). Because of the equitable nature of the writ, a federal court "has broad discretion in conditioning a judgment granting habeas relief [and is] authorized . . . to dispose of habeas corpus matters 'as law and justice require,' " *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987), quoting 28 U.S.C. § 2243. When a double jeopardy violation is found on habeas review, the normal relief is to release the prisoner and to forbid further retrial.

This case, however, is quite obviously far removed from the norm. Rather than maintaining his innocence, Mr. Huss sought at his bench trial to be excused from his acts because of insanity. Even if Mr. Huss had received what he asked for, therefore, he would have been deprived of his liberty, since a defendant in Iowa who is found not guilty by reason of insanity is subject to involuntary commitment in a mental facility. *See* Iowa R. Crim. P. 21(8). If we were to release Mr. Huss, he would be in a better position than he would have been in if the bench trial had concluded in his favor.

We do not believe that under the unique circumstances of this case the double jeopardy clause prohibits the retrial of Mr. Huss altogether. The Constitution does not absolutely require "that every time a defendant is put

to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment," *Wade v. Hunter*, 336 U.S. 684, 688 (1949). A retrial is permissible when a defendant's interest in a single trial is "outweighed by the competing and equally legitimate demand for public justice," *United States v. Givens*, 88 F.3d 608, 611 (8th Cir. 1996).

As we noted earlier, Mr. Huss's second trial was prejudicial to him, as the prosecution offered new evidence specifically to counter the evidence that he had introduced at his first trial. We do not think, however, that every possible retrial of Mr. Huss would suffer from similar difficulties. Mr. Huss's first trial was conducted on a stipulated record, and the same evidence can be submitted to another judge. In such a proceeding, Mr. Huss's interest in a single trial would be greatly diminished, since the prosecution could not introduce new evidence. Although Mr. Huss would nevertheless in a sense be forced to stand trial twice, this type of proceeding certainly would not subject Mr. Huss to the same level of anxiety as a full-blown evidentiary hearing would. In fact, we think that all that the state of Iowa has to do is to bring Mr. Huss's original proceeding to a close.

For these reasons, we believe that it is appropriate to issue a writ of habeas corpus releasing Mr. Huss, unless the state of Iowa, within 90 days after the mandate issues in this case, retries Mr. Huss by submitting the stipulated record from the first trial to a new judge. If Mr. Huss is convicted, he would have his right to appeal the conviction under Iowa law and then to request post-conviction relief if necessary. If, on the other hand, Mr. Huss is found not guilty by reason of insanity, he would be sent

to an appropriate institution for evaluation, and if he is not "dangerous to [him]self or to others" he would be released, *see* Iowa R. Crim. P. 21(8)(e). If the state chooses not to retry Mr. Huss, it would have to release him, subject, of course, to any subsequent commitment procedures that might be available.

IV.

For the foregoing reasons, we reverse the judgment of the district court, and remand for the entry of a judgment granting the writ of habeas corpus unless the state of Iowa retries Mr. Huss in a manner consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

LOREN GLEN HUSS, JR.,	)	NO. 4-97-CV-80169
Petitioner,	)	ORDER
vs.	)	(Filed March 29, 2000)
LEONARD GRAVES, Warden,	)	
Respondent.	)	

Petitioner Loren Glenn Huss, Jr. (hereafter "Huss"), brought this habeas action based on double jeopardy grounds pursuant to 28 United States Code section 2254. Huss was charged in the Iowa District Court with first-degree murder. Iowa Code §§ 707.1, .2. In the first trial – a bench trial – both the prosecution and Huss's attorney presented stipulated evidence to support their joint request that Huss be found not guilty by reason of insanity. The state trial court, however, treated the bench trial as a pretrial conference and denied the parties' joint request for final judgment of not guilty by reason of insanity. In a subsequent jury trial, Huss was convicted of first-degree murder. His conviction and sentence of life in prison were affirmed by the Iowa Supreme Court. He has exhausted state postconviction relief and now asks this court to grant a writ setting aside his first-degree murder conviction.

This court, upon close analysis of the entire record, concludes that the Iowa Supreme Court correctly determined Huss's double jeopardy rights were not violated.

The petition for habeas relief is denied and this habeas action is dismissed.

I. Background. On May 19, 1986, when law enforcement officers forced their way into the apartment where Huss and his girlfriend Marilyn Sheets resided, they found Sheets's mutilated body on the floor, with Huss running around the ransacked room, screaming about Jesus and smearing blood on the walls. After further investigation, Huss was charged with first-degree murder for the violent death of Marilyn Sheets.

Thereafter, both the prosecution and the defense became convinced that Huss had a valid insanity defense. To prevail on that defense, Huss had to establish by a preponderance of the evidence that he was incapable of knowing the nature and quality of his actions at the time of the offense, or that he was unable to distinguish between right and wrong when he committed the offense. *See* Iowa Code § 701.4.

A. November 24, 1986 and February 2, 1987. The parties appeared before a Polk County District Court Judge on November 24, 1986, for what they thought would be a bench trial with a sure outcome – not guilty by reason of insanity.

First, a medical expert testified without objection Huss was competent to participate in a trial, and the trial judge accepted the testimony and found Huss competent to stand trial. *State v. Huss*, No. 87-972 (App. at 58 [hereafter First Trial (F.T.) App.].). Huss waived his right to a jury trial, and the trial judge stated, "Then we will proceed with a bench trial before this Court." (F.T. App. at 63.) The parties proceeded to present stipulated evidence,

confident in their belief that the judge would accept the undisputed evidence and find Huss not guilty by reason of insanity. The prosecuting attorney stated he had never before been convinced a defendant was not guilty by reason of insanity, but the evidence in Huss's case was "quite clear and abundant." (F.T. App. at 77.) The prosecutor further stated that in upholding the laws of the State of Iowa, he was obliged to take the position Huss was legally insane when he killed Marilyn Sheets. (F.T. App. at 77-78.) The prosecutor went on to extol the qualifications of Dr. Michael Taylor, one of the experts on whom the parties relied regarding Huss's insanity. The prosecutor stated Taylor "is probably one of the most competent psychiatrists in the criminal law area that it's ever been my pleasure to come in contact with." (F.T. App. at 81.)

More than two months passed. Then on February 2, 1987, the trial judge shocked defendant and counsel for both sides when he issued an oral ruling, followed by a written ruling, that was not a final decision at all. The court (1) characterized the November 24, 1986, proceeding as "a pretrial hearing," (2) found lacking the evidence to support the insanity defense, and (3) set the case for a jury trial. The judge's reasons for refusing to render a verdict must be described in some detail because of their direct impact on Huss's double jeopardy defense.

The judge explained he was "limited to a finding of not guilty by reason of insanity," and Huss did not meet his burden of proving it by a preponderance of the evidence. The judge relief on deposition testimony of Shahe Zenian, a clinical psychologist at Broadlawns Hospital in Des Moines, Iowa, who said that:

> I can conceive of situations where a rather ghastly crime might be committed, and the person is not necessarily either clinically psychotic nor, you know, legally insane, yeah."

(F.T. App. at 84.) The judge observed that Zenian had not examined Huss before Marilyn Sheets died, even though Zenian testified his diagnosis relied, in part, on interviews Mr. Roy Kaufman, Director of Social Services at broadlawns, had with Huss's family regarding Huss's conduct before Sheets's death. (App. at 84.) Zenian diagnosed Huss with manic depressive psychosis. Zenian recognized that between January and June 1983, Huss was examined at the Iowa Medical and Classification Center in Oakdale. Dr. Paul L. Loeffelholz, M.D., Clinical Director, signed the report and findings. Referring to the Oakdale report, Zenian testified:

> Their final diagnosis was that of mixed substance abuse and passive-aggressive personality disorder. Almost a little comical in light of the current charges directly.

The personnel at Oakdale did not find any psychosis in Huss. The judge then observed, "Apparently there was no evaluation or hospitalization of the defendant after Oakdale and prior to this incident." (App. at 85.) Zenian referred to police officers who arrested Huss for traffic violations earlier on the day Huss killed Sheets. The Judge remarked he did not have the benefit of their testimony, but he observed Zenian stated. "There's absolutely no indication that this act was the end culmination of some kind of animosity that he had towards Marilyn. . . . " (F.T. App. at 85.)

The judge also found as fact that James Rowley, a senior police officer, said he interviewed Steven Vilman, the manager of a business that once employed both Huss and Sheets. According to Rowely, Vilman said Sheets had told Vilman that she and Huss had broken up three weeks before Sheets' death. According to Rowley, Sheets told Vilman that Huss was reading the Bible, and six months before Sheets died, Huss assaulted and bruised her. Vilman also told Rowley that Vilman spoke with Huss the Friday before Sheets died, and Huss appeared sane. (F.T. App., at 85-86.)

The judge accepted as fact the deposition testimony of police officer Dennis Westover, who had interviewed Sheets's best friend; she told him she had seen Huss in the weeks before Sheets died, and she did not observe anything abnormal about Huss. Officer Westover testified he also talked with the manager of the apartment where Huss lived, and the manager said she talked with Huss the Friday before Sheets died and thought Huss appeared normal. (F.T. App. at 86.)

The judge found the parties relied heavily on the deposition of Michael Taylor, M.D., who diagnosed Huss as having bipolar affective disorder. The judge wrote:

> [The prosecuting attorney] refers to [Taylor] as a psychologist. Unfortunately, there is nothing in his deposition indicating his training, degrees and experience. . . . In his deposition, Dr. Taylor gave a diagnosis different from the one given by Shahe Zenian. He, like Mr. Zenian, relied on information gathered by Mr. Kaufman from the family members in making his diagnosis. There is no indication he and Mr. Kaufman talked to

> the people the police did. Specifically, people other than family members, who saw the defendant a short time prior to the incident and found him normal.

(App. at 86-87.) In his conclusions of law, the trial judge wrote:

> Based on the record before the Court, the Court cannot find the defendant not guilty by reason of insanity. Neither Shaha Zenian nor Dr. Taylor saw or examined the defendant prior to the incident. Both stated that observations of the defendant's behavior prior to the incident contributed to forming their diagnoses. Both referred to comments made by family members only, neither discuss the observations of people the police interviewed who found the defendant normal two to three days prior to the incident. Neither seemed to consider that the police arrested the defendant hours before the incident and released him. Neither indicated that they talked to the arresting police officers to obtain their observations. Neither discussed the findings at Oakdale and how they should be considered. Neither discussed the comments of Mr. Vilman concerning the allegations of physical abuse by the defendant to the victim some time before the incident. The Court is concerned with the foundation of the diagnoses and, therefore, questions the validity of the diagnoses. The Court, for these reasons and others found in the Statement of Facts, has not accepted the diagnoses of Dr. Taylor and Shahe Zenian. The defendant has not presently met his burden.
>
> Because the Court is limited to a finding of not guilty by reason of insanity, the hearing was not dispositive of the entire case. This is a pre-

> trial hearing only and, therefore, the defendant may raise the issue of insanity at trial if he desire to do so.

(F.T. App. at 87-88.) The trial judge did not consult the parties between submission of the case for a bench decision and issuance of the oral and subsequent written rulings. (Ramey Depo., F.T. App. at 146-47.)

Counsel for Huss withdrew and substitute counsel was appointed. The County Attorney also withdrew, citing a conflict of interest, and the Iowa Attorney General prosecuted the case. Huss's new defense counsel moved for an order that the State of Iowa stipulate Huss was legally insane when he killed Marilyn Sheets. A different judge denied the resisted motion, and Huss was tried before a jury. On May 12, 1987, the jury found Huss guilty of first-degree murder.

B. Direct Appeal. On direct appeal, Huss argued he was tried twice for the same offense, in violation of the Double Jeopardy Clause. The Iowa Supreme Court ruled the November 24, 1986, proceeding was a bench trial, and the judge's February 2, 1987, ruling was a sua sponte declaration of mistrial. *State v. Huss*, 430 N.W.2d 621, 624 (Iowa 1988). The parties to this habeas action do not take issue with that ruling. After citing *United States v. Jorn*, 400 U.S. 470 (1971), *Gori v. United States*, 367 U.S. 364 (1961), and *Oregon v. Kennedy*, 456 U.S. 667 (1982), the Iowa Supreme Court went on to conclude the mistrial "was prompted solely by a desire to protect the defendant's rights." *Huss*, 430 N.W.2d at 624. The court continued, "when the trial court realized that its assessment of the evidence of insanity did not match the previously unquestioned conclusions of counsel, it chose the course

deemed fairest to defendant: terminate the trial and reschedule the case before an impartial tribunal." *Id.* at 625. The Iowa Supreme Court concluded the trial court "was well within its sound discretion in doing so." *Id.*

In November of 1991, Huss sought postconviction relief, but the Iowa District Court denied the petition and the Iowa Court of Appeals affirmed in 1998.

C. Federal Habeas Proceedings. Although Huss filed his first petition for federal habeas relief in 1993, this court dismissed the action without prejudice for failure to exhaust. Huss then filed this section 2254 petition on April 23, 1997, but this court again dismissed the petition for failure to exhaust. The court of appeals initially affirmed the dismissal, stating Huss had exhausted his double jeopardy claim but the claim was not a basis for habeas relief. *Huss v. State*, No. 97-2893 (8th Cir. Nov. 9, 1998) (per curiam). On December 29, 1998, however, the court of appeals granted Huss's motion for rehearing and then returned the case for this court to address the double jeopardy issue on its merits.

II. Applicable Habeas Law. Before obtaining federal habeas corpus review, a petitioner must "exhaust" the federal claim in the appropriate state forum, *see* 28 U.S.C. § 2254(b), (c), by fairly presenting to the state courts the substance of the federal claim. *See Krimmel v. Hopkins*, 56 F.3d 873, 875-76 (8th Cir.), *cert. denied*, 516 U.S. 1015 (1995). To fairly present a claim in state court, a petitioner must give "the highest state court a fair opportunity to rule on the factual and theoretical substance of his claim." *Id.* (quotations omitted). Further, a federal court "will not review a question of federal law decided by a state court

if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). When a petitioner has defaulted a federal claim under such a state rule, a federal court cannot review the claim unless the petitioner shows cause for the default and actual prejudice as a result of the underlying federal violation, or unless the petitioner shows a fundamental miscarriage of justice will result if the claim is not reviewed. *Id.* at 750.

For claims properly before a federal court, a writ of habeas corpus may be granted only if the prior adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

28 U.S.C. § 2254(d). The United States Court of Appeals for the Eighth Circuit has interpreted the "unreasonable application" prong of § 2254(d)(1) to mean "the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." *Long v. Humphrey*, 184 F.3d 758, 760 (8th Cir. 1999) (quotation marks omitted, adopting the Third Circuit's view of "unreasonable application"). The factual determinations made by a

state court are presumed to be correct and can be rebutted only by a showing of clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

III. Theory for Relief, Estoppel, and Exhaustion. Huss contends the Iowa Supreme Court erred in failing to hold that the State violated the Double Jeopardy Clause in the jury trial resulting in his murder conviction. He argues the Iowa Supreme Court committed error when it ruled that the trial judge declared a mistrial in the "sole interest of the defendant," and it committed error in making a post hoc characterization of the mistrial as one in the "sole interest of the defendant." Huss argues the trial court abused its discretion in sua sponte subjecting him to a second trial; he contends the trial judge neither respected his right to determine whether he wanted a mistrial, nor considered alternatives to a mistrial.

This court is satisfied Huss fairly presented his double jeopardy argument to the Iowa courts. In his direct appeal, he argued, "No 'manifest necessity' for nor furtherance of some 'end of public justice' by termination of the bench trial appears at any point in the record." *State v. Huss*, No. 87-972, Appellant's Br. at 20. Huss is entitled to a decision in this habeas action on the merits of his double jeopardy claim.

IV. Merits of Huss's Double Jeopardy Claim. The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V; *Arizona v. Washington*, 434 U.S. 497, 503 (1978). The Supreme Court has recognized there are times

when retrial of a defendant is not barred after a judge ends the first trial without a verdict and without the defendant's consent. *See United States v. Jorn*, 400 U.S. 480-81 (1971) (quoting *United States v. Perez*, 9 Wheat. 579, 580 (1824)). Refusing to issue hard and fast rules on the subject, the Court has stated a mistrial and subsequent reprosecution is permissible when " 'taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.' " *Id.* (quoting *Perez*). Using its sound discretion, a court must exercise its power to declare a mistrial without a defendant's consent " 'with the greatest caution, under urgent circumstances, and for very plain and obvious causes.' " *Id.* (quoting *Perez*). "Manifest necessity" means a "high degree" of necessity. *Arizona*, 434 U.S. at 507.

In *Gori*, relied on by the Iowa Supreme Court, the trial judge abruptly and without input from the defendant declared a mistrial during the prosecution's examination of a witness. The judge took the action believing the prosecution was about to introduce improper evidence of the defendant's other crimes. *Gori*, 367 U.S. at 364. In allowing reprosecution of the defendant, the Court held

> we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial.

Id. at 369.

Nearly ten years later, the Court in *Jorn* refused to hold a mistrial had been in the sole interest of the defendant, allowing the State to reprosecute the defendant. The Court distinguished *Gori* on its facts. 400 U.S. at 482-83. The trial judge in *Jorn* had been concerned the government did not provide adequate warning to several of its witnesses of their constitutional rights. The judge declared a mistrial so the witnesses could consult with their own legal counsel. *Id.* at 473. Theorizing it likely would help the defendant if the witnesses were called to testify after consulting with their counsel, and the mistrial was not motivated by bad faith of the prosecution or the judge, the government argued the defendant should be subject to reprosecution. The United States Supreme Court held the government's theory was "nothing more than an exercise in pure speculation," and it was "unable to conclude on this record that this is a case of a mistrial made 'in the sole interest of the defendant.' " *Id.* at 483. The Court further stated the policies underlying double jeopardy are aimed not simply at avoiding prosecutorial or judicial overreaching, but also to protect a defendant's " 'valued right to have his trial completed by a particular tribunal.' " *Id.* at 484 (quoting *Wade v. Hunter,* 336 U.S. 684, 689 (1949).

Recently, the United States Court of Appeals for the Eighth Circuit has explained that habeas relief in a case involving application of the manifest necessity standard hinges on whether the state court adjudication "resulted in a decision that . . . involved an unreasonable application[ ] of clearly established Federal law, as determined by the Supreme Court of the United States." *Long v. Humphrey,* 184 F.3d at 759 (citing 28 U.S.C. § 2254(d)(1)).

A key question in the analysis is "whether less drastic alternatives were available." *Id.* at 761.

V. Conclusion. I conclude, as did the Iowa Supreme Court, that the government did not violate Huss's double jeopardy rights when the trial judge declared a mistrial and scheduled the case for a jury trial. The Iowa Supreme Court correctly applied federal constitutional standards. The court wrote:

> We are persuaded that the record before us reveals a situation in which the trial court's decision not to issue a verdict was prompted solely by a desire to protect the defendant's rights. The court was clearly aware of the parties' anticipated disposition of the case. It knew that counsels' agreement undoubtedly affected Huss' decision to submit the case upon stipulated evidence. With even the prosecutor arguing strenuously for an acquittal based on insanity, the court could reasonably assume that defense counsel had not truly contemplated the risk of a guilty verdict.
>
> Thus, when the trial court realized that its assessment of the evidence of insanity did not match the previously unquestioned conclusions of counsel, it chose the course deemed fairest to defendant: terminate the trial and reschedule the case before an impartial tribunal. Given the unusual circumstances we have outlined, we think the court was well within its sound discretion in doing so. The judgment entered on the verdict reached in Huss' subsequent jury trial is, therefore, affirmed.

Although Huss contends this decision of the Iowa Supreme Court constituted mixed question of law and

fact, I conclude the analysis of what occurred after submission to the trial judge in the state court was primarily a fact-bound determination on which the Iowa Supreme Court's decision is binding upon this court. The Iowa Supreme Court decided, consistent with the evidence of record, that the sole desire of the trial court was to protect the defendant's rights. That court reasoned that if the trial court had not declared a mistrial, it would have found defendant guilty of first-degree murder, after rejecting the insanity defense. The Iowa Supreme Court decision is consistent with *United States v. Gori*, 367 U.S. at 370, where that Court wrote:

> Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection and he may be retried consistently with the Fifth Amendment.

Id. at 368, quoted in *State v. Huss*, 430 N.W.2d at 624.

In summary, that decision of the Iowa Supreme Court constitutes a reasonable application of federal double jeopardy law and the evidence in this case concerning the mistrial that the Iowa district judge declared. The State trial judge's only purpose, according to the factual decision of the Iowa Supreme Court, was to give the defendant a fair trial.

The petition for habeas relief is denied.

IT IS SO ORDERED.

Dated this 29th day of March, 2000.

/s/ Charles R. Wolle
CHARLES R. WOLLE, JUDGE
UNITED STATES
DISTRICT COURT

Supreme Court of Iowa.

STATE of Iowa, Appellee,

v.

Loren Glen HUSS, Jr., Appellant.

No. 87-972.

Oct. 19, 1988.
Rehearing Denied Nov. 18, 1988.

Raymond E. Rogers, Acting Appellate Defender, and B. John Burns, Asst. Appellate Defender, for appellant.

Thomas J. Miller, Atty. Gen., Christie J. Sease and Thomas H. Miller, Asst. Attys. Gen., for appellee.

Considered by HARRIS P.J., and LARSON, SCHULTZ, LAVORATO, and NEUMAN, JJ.

NEUMAN, Justice.

Appellant Loren Huss, Jr., was convicted, following jury trial, of the crime of first-degree murder in violation of Iowa Code sections 707.1 and 707.2 (1985). On appeal from judgment and sentence entered upon his conviction, Huss raises a solitary but significant question: Has he been twice brought to trial for the same offense? Our review of this troublesome record convinces us that he has, but we are likewise convinced that Huss' retrial was the product of a *sua sponte* mistrial declared in his sole interest, consistent with manifest justice. Accordingly, we reject Huss' claim of double jeopardy, and affirm the district court.

I. In May 1986, Loren Huss was charged with first-degree murder in the death of his former girlfriend, Marilyn Sheets. Huss timely notified the State of his intent to

rely on defenses of insanity or diminished responsibility. *See* Iowa R.Crim.P. 10(11)(b). The seemingly senseless brutality of the slaying called into question Huss' competence to stand trial.[1] Hearing on that issue was scheduled for November 24.

Meanwhile, the State deposed two experts listed as prospective witnesses in support of Huss' insanity defense. On the strength of the experts' testimony, the prosecutor and defense counsel engaged in negotiations regarding disposition of the case. Counsel agreed to submit the case to the district court upon stipulated evidence, confident that the court would enter a verdict of not guilty by reason of insanity.

What transpired at the hearing on November 24 is pivotal to our resolution of this case and must be recounted in some detail. First, the court received evidence from Dr. Shahe Zenian, a clinical psychologist. Based on this testimony, the court declared Huss competent to stand trial. Defense counsel then tendered a written waiver of jury trial and the court questioned Huss at length regarding his understanding of the waiver. Significantly, the court asked Huss whether he understood "that by waiving your right to a jury trial you are waiving your right to have those twelve people decide your case and leaving it up to just this court, one person?" The court

---

[1] Police called to the scene of the crime found the victim's body unclothed and covered with bruises and blood, one eye gouged out and her nose severed from her face. Huss was screaming and smearing blood on the walls of the apartment. In Huss' frenzied state, it took four to five officers to restrain him.

concluded the colloquy by stating: "Then we will proceed with a bench trial before this court."

Counsel for the State then expressed the parties' desire to submit the case to the court on stipulated evidence, including the minutes of testimony, depositions of the State's witnesses and defense experts, and certain audio recordings of Huss taped at the crime scene and during a custodial interrogation. Defense counsel assented to this procedure on the record. The court then proceeded, at the State's request, to question Huss about his waiver of the confrontation and cross-examination rights implicated in a stipulated trial and, finally, whether Huss understood the potential ramifications of a finding of not guilty by reason of insanity "in the event the court were to make such a finding."

At this point, the record reveals that court and counsel adjourned to chambers for an off-the-record conference. When the record resumed, the prosecutor attempted to clarify the State's position as follows:

> I wrote the minutes of testimony and I participated in all of the depositions in this case. Therefore, being completely familiar with the evidence in this matter, it is the State's understanding that given the record as it now stands . . . that the court would essentially be placed in the position of having no evidence contrary to the fact that Loren Huss was in fact the individual who killed Marilyn Sheets and that would leave the court only with the determination as to whether or not at the time of the commission of that offense, based upon the attendant circumstances as witnessed by the police officers, the

> fire medic people, and based upon the evaluations of Mr. Huss by competent psychiatric and psychological witnesses, *the only question left for the court would be whether or not Mr. Huss was guilty of this offense or not guilty by reason of insanity* as those reasons are set out in both the criminal code of the State of Iowa and the Iowa Rules of Criminal Procedure.
>
> And that further, in the event of such findings, the court's only options would be that *if the defendant were found guilty by reason of committing the murder without the excuse of insanity, the court's only option would be to sentence the defendant criminally to life in prison. Or in the alternative if the court were to find that the defendant was not guilty by reason of insanity, it is my understanding the court would have no option . . . but to order the defendant committed* for . . . whatever period of time it took for the court to then subsequently find that there had been a sufficient change in his condition that would allow his release.

(Emphasis added.)

For the record, defense counsel concurred in the procedure outlined by the State. After inquiring once again whether *Huss* knew what was going on, the court agreed to take the matter under advisement. Counsel then delivered impassioned closing arguments, marked by a common plea that the court find Huss not guilty by reason of insanity.

It appears safe to say that the court's ruling, filed in February 1987, hit the parties like a bombshell. Much to counsels' surprise, the district court found the evidence

lacking in foundation to support Huss' defense of insanity. Moreover, based on the representations of counsel, the court concluded that it was "limited in its findings to the consideration of the defendant's sanity at the time of the offense." The earlier proceeding was characterized by the court as "a pretrial hearing only." It concluded by scheduling the case for jury trial, noting "the defendant may raise the issue of insanity at trial if he desires to do so."

This unexpected turn of events prompted a flurry of motions and the withdrawal and substitution of counsel in advance of Huss' subsequent jury trial. On appeal from the judgment entered upon the resulting jury verdict, we are concerned only with Huss' claim that he has been twice put in jeopardy for the murder of Marilyn Sheets, in violation of the Fifth Amendment to the United States Constitution.

II. The fifth amendment to the United States Constitution declares, in part, that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Because Huss alleges a violation of this constitutional safeguard, our appellate review is de novo. *See Lamphere v. State*, 348 N.W.2d 212, 215, 218 (Iowa 1984).

It is axiomatic that the constitutional prohibition against double jeopardy was "designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199, 204 (1957). This time-honored principle reflects the notion

> that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187-88, 78 S.Ct. at 223, 2 L.Ed.2d at 204.

Fundamental to the successful assertion of the right, however, is proof of former jeopardy. *See Illinois v. Somerville*, 410 U.S. 458, 467, 93 S.Ct. 1066, 1072, 35 L.Ed.2d 425, 433 (1973) ("the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial"). In a non-jury trial, jeopardy attaches when the court begins to hear evidence. *Serfass v. United States*, 420 U.S. 377, 388, 95 S.Ct. 1055, 1062, 43 L.Ed.2d 265, 274 (1975); *State v. Buss*, 325 N.W.2d 384, 386 (Iowa 1982).

The question is whether the November 24 hearing was a trial. The State claims it was not, pointing to the trial court's ruling that characterized it as a "pre-trial hearing only" and to post-ruling affidavits of counsel which suggest that the purpose of the proceeding was "not to facilitate judicial review of the merits of the case, but to obtain judicial approval of an agreement for disposition." If, as the State contends, this was a plea proceeding, we agree that no jeopardy would attach absent unconditional acceptance of a plea, a requirement clearly missing here. *See Fransaw v. Lynaugh*, 810 F.2d 518, 523-29 (5th Cir.1987); *see also Untied States v. Soto*, 825 F.2d 616, 620 (1st Cir.1987).

The State can take little comfort in the label affixed by the trial court, for we are not bound by its characterization of the proceeding. *See United States v. Jorn*, 400 U.S. 470, 478, n. 7, 91 S.Ct. 547, 553-54, n. 7, 27 L.Ed.2d 543, 552, n. 7 (1971). Moreover, we are unwilling to accept the State's characterization of the November 24 hearing as a plea proceeding. To do so would lead us to the unacceptable conclusion that the transcript before us has recorded mere lines in a mock trial script composed by counsel to facilitate a predetermined outcome.

As we made clear in *State v. Everett*, 372 N.W.2d 235 (Iowa 1985), a bench trial on stipulated evidence is not the same as a guilty plea proceeding, principally because no matter how overwhelming the evidence of guilt, the question of whether to convict or acquit remains with the trier of fact. *Id.* at 236-37. Applying that reasoning to the plain import of the record before us, we are convinced that on November 24, Loren Huss was "subjected to the hazards of trial and possible conviction" for the murder of Marilyn Sheets. *See Green*, 355 U.S. at 187, 78 S.Ct. at 223, 2 L.Ed.2d at 204. When the trial court was given the evidence to consider and took the case under advisement, jeopardy attached.

III. Given our view that the November 24 proceeding was a bench trial, the parties concede that the trial court's subsequent ruling amounted to a *sua sponte* declaration of mistrial. We concur in this characterization of the trial court's action and now turn to a determination of the impact of mistrial on Huss' double jeopardy claim.

We begin with the premise that "[t]he constitutional proscription of double jeopardy does not mean that every

time an accused is placed on trial he must go free absent a final judgment." *State v. Gowins*, 211 N.W.2d 302, 304 (Iowa 1973). Decisions of the United States Supreme Court have permitted reprosecution after mistrial, notwithstanding the attachment of jeopardy, when done to serve the societal interest in achieving justice, *see Jorn*, 400 U.S. at 480-86, 91 S.Ct. at 554-58, 27 L.Ed.2d at 554-57, or when done in the "sole interest of the defendant," *see Gori v. United States*, 367 U.S. 364, 368-69, 81 S.Ct. 1523, 1526-27, 6 L.Ed.2d 901, 904-05 (1961). "If the law were otherwise, 'the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again.' " *Oregon v. Kennedy*, 456 U.S. 667, 672, 102 S.Ct. 2083, 2087, 72 L.Ed.2d 416, 422 (1982) (quoting *Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974, 978 (1949)).

The rationale underlying these exceptions rests on the broad discretion vested in trial courts to "conscientiously exercise their most sensitive judgment . . . for the more effective protection of the criminal accused." *Gori*, 367 U.S. at 370, 81 S.Ct. at 1527, 6 L.Ed.2d at 905.

> Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection and he may be retried consistently with the Fifth Amendment.

Id. at 368, 81 S.Ct. at 1526, 6 L.Ed.2d at 904.

We are persuaded that the record before us reveals a situation in which the trial court's decision not to issue a verdict was prompted solely by a desire to protect the defendant's rights. The court was clearly aware of the parties' anticipated disposition of the case. It knew that counsels' agreement undoubtedly affected Huss' decision to submit the case upon stipulated evidence. With even the prosecutor arguing strenuously for an acquittal based on insanity, the court could reasonably assume that defense counsel had not truly contemplated the risk of a guilty verdict.

Thus, when the trial court realized that its assessment of the evidence of insanity did not match the previously unquestioned conclusions of counsel, it chose the course deemed fairest to defendant: terminate the trial and reschedule the case before an impartial tribunal. Given the unusual circumstances we have outlined, we think the court was well within its sound discretion in doing so. The judgment entered on the verdict reached in Huss' subsequent jury trial is, therefore, affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-2219

Loren Glen Huss, Jr., Appellant,	*	
v.	*	Order Denying Petition for Rehearing and for Rehearing En Banc
Leonard Graves, Warden, Appellee.	*	

The appellee's petition for rehearing en banc is denied. Judge Bowman and Judge Hansen would grant the petition. The appellant's petition for rehearing is also denied.

The petitions for rehearing by the panel are also denied.

The motion strike is denied as moot.

(5128-010199)

August 20, 2001

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

ORIGINAL

No. 01-973
01-7064

Supreme Court, U.S.
FILED
FEB 7 2002
CLERK

In the
SUPREME COURT OF THE UNITED STATES

LEONARD GRAVES, Warden,
Cross-Petitioner,

v.

LOREN GLEN HUSS, JR.,
Cross-Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Leonard Graves is the custodian of habeas applicant Loren Glenn Huss, the Petitioner and Cross-Respondent in this matter, and has filed his own Conditional Cross-Petition for Certiorari. Mr. Huss opposes the Respondent's Cross-Petition on two separate grounds: first, in light of a retrial subsequent to the Eighth Circuit's grant of habeas relief, and the resulting acquittal of Mr. Huss on grounds of insanity, any further proceedings at the behest of the State of Iowa would violate Double Jeopardy; and second, the Respondent's Cross-Petition does not raise any legitimate basis for this court's grant of certiorari.

As both Mr. Huss's Petition for Writ of Certiorari and Mr. Graves' Cross-Petition make clear, Mr. Huss's effort to secure habeas relief is based solely on his claim that his second trial, in 1987, resulting in a jury verdict of guilty of murder, violated Double Jeopardy because his first trial, presented to a judge on a stipulated record, was terminated without the acquiescence of the defendant in the absence of a "manifest necessity." The Eighth Circuit Court of Appeals agreed. *Huss v. Graves*, 252 F. 3d 952, 958 (8th Cir. 2001). However, the Court of Appeals also concluded that the State, if it so elected, could retry Mr. Huss by resuming the first trial and submitting the same stipulated record to a new state

trial judge. *Id.* It is this aspect of the Court of Appeals' decision which is the subject of Mr. Huss' Petition for Writ of Certiorari.

Mr. Huss resisted the Eighth Circuit's remand on Double Jeopardy grounds, first by filing a Motion for Rehearing En Banc in the Eighth Circuit, and then by requesting the Eighth Circuit to recall its mandate until cert proceedings were complete in this Court. Both those efforts were unsuccessful. The State, declining to seek its own stay of the Eighth Circuit's mandate, elected to retry Mr. Huss as permitted by the panel decision. Mr. Huss made several Motions for a Continuance in state court to allow him to pursue certiorari in this court, all of which were resisted by the state. When those were unsuccessful, he pursued his efforts to stay the state proceedings to the Iowa Supreme Court, which efforts were successfully resisted by the state. Finally, on November 19, 2001, Mr. Huss filed an Application to Stay Mandate to this Court, to allow his Petition for Certiorari, filed on the same date, to be decided before the state retrial. That Application was denied by Justice Thomas on November 23, 2001.

The retrial was held on November 26, 2001 before Judge Linda R. Reade of the District Court for Polk County, Iowa; she took the matter under advisement and on December 13, 2001, found Mr. Huss not guilty by reason of insanity. State v. Huss, Iowa District Court of Polk County, Case No. FECR 31984 [hereinafter

State v. Huss], Findings, Conclusions, and Judgment Following Trial, at p. 17. On that same date, she ordered Mr. Huss remanded to the Iowa Medical and Classification Center of the Iowa Department of Corrections for an evaluation pursuant to Iowa Rule of Criminal Procedure 21(8), for the purpose of determining whether he should be criminally committed. State v. Huss, Order Pursuant to Iowa Rule of Criminal Procedure 21(8). The hearing on the state's effort to commit Mr. Huss was heard on January 7, 2002, and the matter is pending before the Honorable Robert Blink of the District Court for Polk County, Iowa.

Additionally, on October 16, 2001, the state of Iowa filed a petition to commit Mr. Huss as a Sexually Violent Predator, pursuant to Chapter 229A of the Code of Iowa, which petition is premised on his being released from custody on the basis of the Not Guilty by Reason of Insanity verdict. In Re the Detention of Loren G. Huss, Jr., Iowa District Court for Polk County, No. CL 87815, Petition.

REASONS FOR DENYING THE CROSS PETITION

The Cross-Petition is expressly conditional--the Respondent does not seek certiorari unless this Court grants Mr. Huss's Petition for Writ of Certiorari. But there are compelling reasons to deny the Cross-Petition, whether or not the Petition is granted. First, Mr. Huss's intervening acquittal on grounds of insanity renders the State's efforts to reinstate his prior jury verdict a violation of Double

Jeopardy. Second, the Respondent-Cross-Petitioner's claim that the ruling of the Eighth Circuit Court of Appeals granting habeas relief to Petitioner warrants review by the Court is without merit: the decision below is not in conflict with any other circuit, and it is not in conflict with any decision of this Court.

I. ONCE THE STATE ELECTED TO RETRY MR. HUSS FOLLOWING THE GRANT OF HABEAS RELIEF, AND HE WAS ACQUITTED ON GROUNDS OF INSANITY, DOUBLE JEOPARDY BARS ANY ATTEMPT BY THE STATE TO SECURE FURTHER REVIEW.

On December 13, 2001, following a trial initiated by the state, Loren Huss was found not guilty by reason of insanity. Given this verdict, the Constitution no longer permits the state, in an attempt to reinstate the jury verdict, to challenge the Eighth Circuit's opinion vacating the 1987 conviction.

Acquittals are afforded special protection by the Double Jeopardy Clause of the Fifth and Fourteenth Amendments; acquittals based on the merits are final and not open to review. In *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), this Court stated: "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that [a] verdict of acquittal...could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy,

and thereby violating the Constitution." *Id.* 430 U.S. at 571, quoting *Ball v. United States*, 163 U.S. 662, 671 (1896). The Court also defined what constitutes an acquittal entitled to such finality. "We must determine whether the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." *Id.*, 430 U.S. at 571.

The special protection afforded a straight acquittal extends as well to a verdict of not guilty by reason of insanity. "Such a factual finding [of not guilty by reason of insanity] *does* 'necessarily establish the criminal defendant's lack of criminal culpability'..., under the existing law; the fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles'...affects the accuracy...but it does not alter its essential character." *United States v. Scott*, 437 U.S. 82, 98 (1978)(internal citations omitted).

Thus, the Court has established two important principles. First, acquittals involving factual findings of guilt or innocence are final judgments barred from review by the Double Jeopardy Clause. Second, an insanity acquittal passes this test, and cannot be reviewed or disturbed. Since Mr. Huss is the beneficiary of a final verdict of not guilty by reason of insanity, any effort on the part of the state now to reinstate the former guilty verdict violates Double Jeopardy.

The state acquiesced in the merits of the Eighth Circuit decision on the issue of double jeopardy when it chose to proceed to a third trial over the Respondent's objections, in lieu of seeking review in this Court. The state had ample opportunity to seek a stay in order to challenge the ruling below. Instead, the state chose to retry Mr. Huss in compliance with the Circuit Court's remedy. This act of retrying Mr. Huss, which was subsequently followed by an acquittal, renders any attempt now by the state to seek review of the lower Court's decision a violation of Double Jeopardy. [1]

II. RESPONDENT'S CONDITIONAL CROSS-PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THE EIGHTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT OR ANY OTHER COURT.

The Respondent seeks certiorari from this Court on the asserted ground that the Eighth Circuit erroneously analyzed Mr. Huss's double jeopardy claim under

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[1] While the Double Jeopardy clause prohibits review by the State, Mr. Huss's Petition for Writ of Certiorari is not rendered moot by his acquittal by reason of insanity. As a result of this acquittal by reason of insanity, Mr. Huss is currently subject to the state's efforts to commit him both under Iowa Rule of Criminal Procedure 21(8) and the state's Sexually Violent Predator provisions, Ch. 229A (Iowa Code 2001). If this court determines that the third trial was not permissible, there is no lawful basis for either of these commitment procedures, so such a ruling would provide actual relief to Mr. Huss, rendering his efforts to secure certiorari a live controversy under Article III.

the "contrary to" clause of 28 USC §2254(d)(1).

Section 2254 (d) (1) provides:

> An application for a writ of habeas corpus ...shall not be granted...unless the adjudication of the claim–
> 1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

Citing two Sixth Circuit cases, *Johnson v. Karnes*, 198 F.3d 589, 593 (6th Cir. 1999) and *Harpster v. Ohio*, 128 F.3d 322, 327 (6th Cir. 1997), Respondent-Cross-Petitioner argues that the Eighth Circuit's decision conflicts with the rule in the Sixth Circuit, which, he posits, requires that double jeopardy claims properly characterized as involving mixed questions of fact and law be evaluated not under the "contrary to" clause, which is reserved for questions of law, but under the "unreasonable application" clause. Respondent's Cross-Petition for Certiorari at 9-11. But his argument has no basis in current law. *Johnson* and *Karnes*, both of which were decided before the Supreme Court's ruling in *Williams v. Taylor*, 529 U.S. 362 (2000), and their bifurcated approach to analyzing §2254(d)(1), are no longer good law following the *Williams* decision.

Before the *Williams* decision, the circuits were split on the proper interpretation of §2254(d)(1). The Fifth Circuit, *see, Lamb v. Johnson*, 179 F.3d 352 (5th Cir. 1999), Seventh Circuit, *see, Ashford v. Gilmore*, 167 F.3d 1130 (7th

Cir. 1999), and the Eleventh Circuit, *see, Neelley v. Nagle*, 138 F.3d 917 (11th Cir. 1998), viewed the statute as requiring the court to apply the "contrary to" clause to questions of law, and the "unreasonable application" clause to mixed questions of fact and law. The Eighth Circuit, *see, Richardson v. Bowersox*, 188 F.3d 973 (8th Cir. 1999), along with the First Circuit, *see, Vieux v. Pepe*, 184 F.3d 59 (1st Cir. 1999) and the Third Circuit, *see, Matteo v. Superintendent*, 171 F.3d 877 (3d Cir. 1999), utilized what one scholarly source describes as "a two-step inquiry, in which the reviewing court first determined whether the Supreme Court had already developed a legal standard to 'govern' claims of the sort raised in the habeas corpus petition; cases coming within such a standard were subject to the 'contrary to...law' clause, leaving other cases subject to the 'unreasonable application of...law' clause." James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure*, § 30.2c at 210 (3d ed. Supp. 2000).

The Supreme Court's ruling in *Williams v. Taylor* resolved this conflict between the circuits. Justice O'Connor, in that portion of her opinion which constitutes the majority opinion, defined the "contrary to" clause of § 2254(d)(1) in the following manner:

> The text of 2254(d)(1) therefore suggests that the state court's decision must be substantially different from the relevant precedent of this Court...A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in

> our cases...A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.

Williams v. Taylor, 529 U.S. at 405-406. [2]

This standard, which the Eighth Circuit applied in this case, has since been adopted by every Circuit. *See, e.g., Mastracchio v. Vose*, 274 F.3d 590 (1st Cir. 2001); *Washington v. Schriver*, 240 F.3d 101 (2nd Cir. 2001); *Jermyn v. Horn*, 266 F.3d 257 (3rd Cir. 2001); *White v. Lee*, 238 F.3d 418 (4th Cir. 2000); *Valdez v. Cockrell*, 274 F.3d 941 (5th Cir. 2001); *Brumley v. Wingard*, 269 F.3d 629 (6th Cir. 2001); *Boss v. Pierce*, 263 F.3d 734 (7th Cir. 2001); *Siers v. Weber*, 259 F.3d 969 (8th Cir. 2001); *Van Tran v. Lindsey*, 212 F.3d 1143 (9th Cir. 2000); *Hale v. Gibson*, 227 F.3d 1298 (10th Cir. 2000); *Putman v. Head*, 268 F.3d 1223 (11th Cir. 2001). At least two circuits, the Fifth and the Ninth, have expressly characterized *Williams* as having rejected a bifurcated approach to §2254(d)(1). *Valdez v. Cockrell*, 274 F. 3d at 946; *Van Tran v. Lindsey*, 212 F.3d at 1149-1150. And the Sixth Circuit, upon which Respondent relies in his argument that a conflict exists

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[2] Respondent asserts that Justice O'Connor adopted the "law/mixed question of fact and law" analysis in *Williams*, citing 529 U.S. at 405. He erroneously ascribes Justice O'Connor's description of the law of the 4th Circuit on the matter as her "holding" in *Williams*.

between that circuit and the Eighth Circuit, now declines c .n to consider whether a claim is one of law or a mixed question of fact and law in analyzing the two prongs of §2254(d)(1). *See, e.g., Brumley v. Wingard*, 269 F.3d at 637-638; *Magana v. Hofbauer*, 263 F.3d 542 (6th Cir. 2001)(Applying "contrary to" prong to an ineffective assistance of counsel claim).

Justice O'Connor not only rejected the bifurcated approach by embracing a standard that makes no distinction between questions of law and mixed questions; she tested the claim in *Williams* under both clauses without considering whether the claim might be characterized one way or the other. 529 U.S. at 405-406. In *Williams*, the claim was based on ineffective assistance of counsel, a paradigmatic mixed question of fact and law. Justice O'Connor did not hesitate to measure the claim under the "contrary to" clause of §2254(d)(1). *Id.* The Eighth Circuit in this case was similarly correct in measuring Mr. Huss's double jeopardy/manifest necessity claim under the "contrary to" clause.

Respondent-Cross-Petitioner makes no claim that the panel applied the wrong test to determine whether the Iowa Supreme Court's decision was "contrary to" clearly established double jeopardy precedent, nor does he assert that under that standard, the panel erroneously concluded that the Iowa Supreme Court's

opinion was in fact "contrary to" controlling precedent.[3] He is unable to identify any genuine conflict between the panel opinion and any Supreme Court opinion, or any conflict between the panel decision and any post-*Williams* decision from a sister circuit. His Conditional Cross-Petition should be denied.

CONCLUSION

For all the foregoing reasons, Petitioner-Cross-Respondent respectfully requests that the Respondent-Cross-Petitioner's Conditional Cross-Petition for Writ of Certiorari be denied.

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[3] Respondent alternatively argues that the Iowa Supreme Court's decision was not an "unreasonable application" of federal law. This argument is not an appropriate basis for granting the Respondent's Cross-Petition because the Eighth Circuit never addressed whether the Iowa Supreme Court's decision constituted an "unreasonable application" of federal law, so there is no ruling on that issue to review.